

STATE OF MICHIGAN
IN THE SUPREME COURT

In re CERTIFIED QUESTION FROM THE
UNITED STATES DISTRICT COURT FOR
THE WESTERN DISTRICT OF MICHIGAN

PAMELA MATTISON, on behalf of M.M.
and M.M.,

Plaintiff,

v

Docket No. 144385

COMMISSIONER OF SOCIAL SECURITY,

Defendant.

144385
ORAL ARGUMENT REQUESTED

BRIEF ON CERTIFIED QUESTION — DEFENDANT

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COMMISSIONER OF SOCIAL SECURITY,

Defendant.

STATEMENT OF JURISDICTION

On April 20, 2007, the United States District Court for the Western District of Michigan certified a question of state law to this Court. JA 225A.¹ The Court granted the request to answer the question. The Court has jurisdiction pursuant to MCL 600.215(2). See also MCR 7.301(A)(5), 7.305(B).

STATEMENT OF QUESTION INVOLVED

Whether M.M. and M.M., conceived after the death of Jeffery Mattison via artificial insemination using his sperm, can inherit from Jeffrey Mattison as his

¹ References to the Joint Appendix are abbreviated as "JA." References to the Supplemental Appendix are abbreviated as "SA." References to the plaintiff's brief are abbreviated as "Pl Br."

children under Michigan intestacy law.

The Commissioner of Social Security answers no. Plaintiff answers yes. The United States District Court for the Western District of Michigan did not answer this question.

STATEMENT OF FACTS

I. Statement of the Case

Plaintiff Pamela Mattison filed an application for child survivors benefits with the Social Security Administration (“SSA” or “agency”) on behalf of her minor twin children, M.J.M. and M.L.M., as survivors of her husband Jeffrey Mattison, a deceased wage earner. JA 29A-30A. The twins were conceived after Mr. Mattison’s death using Mr. Mattison’s frozen sperm. JA 31A, 70A, 112A, 206A-09A.

SSA denied plaintiff’s application for child’s benefits upon initial review and on reconsideration. JA 34A-35A, 41A-43A. The agency explained that M.J.M. and M.L.M. could not establish a legal parent-child relationship with Mr. Mattison for the purpose of obtaining child’s benefits because they were conceived after his death and therefore were unable to inherit as his children under Michigan intestacy law. JA 35A, 42A-43A; see also 42 USC 416(h)(2)(A); 20 CFR 404.355, 404.361(a). Plaintiff then requested a hearing before an Administrative Law Judge (“ALJ”), who affirmed the denial of child’s benefits. JA 16A-22A. The agency’s Appeals Council denied plaintiff’s request for review. JA 3A-5A.

Plaintiff sought judicial review of SSA's determination in the United States District Court for the Western District of Michigan. See SA 4; see also 42 USC 405(g). The parties jointly stipulated that whether M.J.M. and M.L.M. can inherit from Mr. Mattison as his children under Michigan intestacy law is determinative of whether the agency properly denied child's benefits. JA 220A, 221A. The district court then certified this question to this Court. JA 225A.

II. Statutory Background²

A. The Social Security Act

The Social Security Act authorizes child survivors benefits for children who were dependent on a deceased worker before his or her death. Social Security Act Amendments of 1939, § 202, PL 76-379, 53 Stat 1360, 1363-65 (codified as amended at 42 USC 402). Congress's purpose in providing child's benefits was to protect children from the loss of support due to the unanticipated death of a parent. See *Mathews v Lucas*, 427 US 495, 507; 96 S Ct 2755; 49 L Ed 2d 651 (1976) (citing S Rep No 89-404, at 110 (1965), reprinted in 1965 USCCAN 1943, 2050).

Not all biological children of a deceased wage earner are eligible for child's benefits. See *Mathews*, 427 US at 507 (explaining that Congress did not intend the Act to provide "general welfare" benefits to children). In order to be eligible for

² The relevant statutory provisions are also reproduced in the attached addendum to this brief.

child's benefits, an applicant must demonstrate that under the criteria of the Act, he or she (1) is the child of the deceased wage earner within the meaning of the Act, 42 USC 402(d)(1), and (2) was dependent or may be deemed dependent upon the deceased wage earner at the time of the wage earner's death, 42 USC 402(d)(1)(C)(ii). In determining whether an applicant is a child of the deceased wage earner for the purposes of the Act, the Commissioner of Social Security "shall apply such law as would be applied in determining the devolution of intestate personal property by the courts of the State . . . in which [the insured individual] was domiciled at the time of his death." 42 USC 416(h)(2)(A). If an applicant can inherit as a child of the deceased wage earner under applicable state intestacy law, he or she will also be "deemed" dependent on the wage earner. See 20 CFR 404.361(a); *Lucas*, 427 US at 514 ("[W]here state intestacy law provides that a child may take personal property from a father's estate, it may reasonably be thought that the child will more likely be dependent during the parent's life and at his death."); see also *Beeler v Astrue*, 651 F3d 954, 958-59 (CA 8, 2011), pet for cert filed, 80 USLW 3360 (Nov 23, 2011) (No 11-667).

Four federal courts of appeals have considered challenges brought by posthumously conceived children who argued that SSA erred in denying them child's benefits based on their inability to inherit as the child of the deceased wage earner under applicable state intestacy law. The claimants argued that an undisputed

biological child-parent relationship with a deceased wage earner is sufficient to establish a legal child-parent relationship under the Act for the purpose of obtaining child's benefits. The Fourth and Eighth Circuits affirmed the agency's interpretation of the Act, see *Schafer v Astrue*, 641 F3d 49, 51 (CA 4, 2011), pet for cert filed, 80 USLW 3405 (Dec 29, 2011) (No 11-824); *Beeler v Astrue*, 651 F3d at 966, and the Third and Ninth Circuits reversed, see *Capato v Astrue*, 631 F3d 626, 632 (CA 3, 2011); *Gillett-Netting v Barnhart*, 371 F3d 593, 597 (CA 9, 2004). The United States Supreme Court granted review of the Third Circuit decision, and the case was argued on March 19, 2012. See *Capato*, 631 F3d 626, cert granted, 132 S Ct 576; 181 L Ed 2d 419 (US Nov 14, 2011) (No 11-159).

Even if the U.S. Supreme Court were to hold that undisputed biological children need not demonstrate intestacy rights in order to establish a child-parent relationship with the deceased wage earner under the Act, the applicants in this case, M.J.M. and M.L.M., would still need to demonstrate a relationship to Mr. Mattison under Michigan law for dependency purposes. Accordingly, regardless of how the U.S. Supreme Court resolves *Capato*, Michigan law will be relevant to determining whether M.J.M. and M.L.M. are eligible for child's benefits.

B. Michigan Intestacy Law

As described above, section 416(h)(2)(A) of the Social Security Act instructs SSA to apply state intestacy law in determining whether an applicant has a

child-parent relationship with the deceased wage earner within the meaning of the Act, specifically the intestacy law of the state in which the wage earner “was domiciled at the time of his death.” 42 USC 416(h)(2)(A). No one disputes that Mr. Mattison was domiciled in Michigan at the time of his death. See SA 2.

Under Michigan law, “[a]ny part of a decedent’s estate not effectively disposed of by will passes by intestate succession to the decedent’s heirs as prescribed in this act.” MCL 700.2101(1). MCL 700.2103 provides that a decedent’s estate passes only to “individuals who survive the decedent.” The statute states that “[s]urvive’ means that an individual neither predeceases an event, including the death of another individual, nor is considered to predecease an event under section 2104 or 2702.” MCL 700.1107(j); see also MCL 700.2106(3)(b) (“‘Surviving descendant’ means a descendant who neither predeceased the decedent nor is considered to have predeceased the decedent under section 2104.”). Section 2104 states that “[a]n individual who fails to survive the decedent by 120 hours is considered to have predeceased the decedent for purposes of . . . intestate succession, and the decedent’s heirs are determined accordingly.” The statute provides one exception to this requirement: “[a]n individual in gestation at a particular time is treated as living at that time if the individual lives 120 hours or more after birth.” MCL 700.2108.

III. Factual and Procedural Background

A. Factual Background

Plaintiff and Mr. Mattison were married in Michigan on November 4, 1995. JA 24A, 202A, 220A. Mr. Mattison began banking his sperm following a diagnosis of lupus.. JA 198A, 203A, 220A. Plaintiff became pregnant using artificial insemination and on February 20, 1998, she gave birth to their daughter, J.C.M. JA 26A, 198A-99A, 220A.

Mr. Mattison died on January 18, 2001, while domiciled in Michigan. JA 70A; SA 2. Mr. Mattison's power of attorney, dated May 18, 1998, gave plaintiff the power "[t]o take any and all action necessary pertaining to any sperm or embryos [he] may have stored including their implantation or termination." JA 90A, 94A; see also SA 1-2. On January 28, 2001, plaintiff had her eggs retrieved. JA 73A, 207A-09A. These eggs were inseminated with Mr. Mattison's sperm, and were implanted in plaintiff on January 30, 2001. JA 73A, 202A, 208A-09A. On October 8, 2001, plaintiff gave birth to twins M.J.M. and M.L.M. JA 71A, 72A; see also SA 2. SSA does not dispute that Mr. Mattison is the biological father of M.J.M. and M.L.M. JA 17A.

B. Agency and District Court Proceedings

On February 26, 2001, plaintiff applied to SSA for mother and child survivors benefits on behalf of herself and her daughter J.C.M., respectively, based on the

Social Security record of Mr. Mattison. JA 23A, 26A. On October 23, 2001, plaintiff applied to SSA for child survivors benefits for her children M.J.M. and M.L.M. JA 29A. Upon initial review and reconsideration, the agency denied plaintiff's application for M.J.M. and M.L.M., explaining that these children could not establish a parent-child relationship with Mr. Mattison under the Social Security Act for the purpose of obtaining child's benefits because they were conceived after Mr. Mattison's death and therefore were unable to inherit as his children under Michigan law. JA 35A, 41A-43A; see also 42 USC 416(h)(2)(A); 20 CFR 404.355.

Plaintiff requested a hearing before an ALJ. JA 46A, 47A. After conducting an in-person hearing and examining the evidence de novo, the ALJ affirmed the denial of child's benefits for M.J.M. and M.L.M. JA 17A. SSA's Appeals Council then denied plaintiff's request for review. JA 3A.

Plaintiffs filed suit to challenge the denial of child's benefits in the United States District Court for the Western District of Michigan. SA 3; see also 42 USC 405(g) (providing jurisdiction for the district court to review SSA's determination). On February 21, 2007, the parties jointly stipulated that whether M.J.M. and M.L.M. can inherit from Mr. Mattison as his children under Michigan intestacy law is determinative of whether the agency properly denied child's benefits. JA 220A-21A; see also SA 1-4. The district court then certified this question to this Court. JA 225A.

SUMMARY OF ARGUMENT

Michigan intestacy law requires that heirs be alive when the decedent dies, and that heirs survive the decedent. Children conceived after the death of their father, like M.J.M. and M.L.M., do not meet these requirements, and therefore, cannot inherit intestate. The only exception to these requirements allows children who were “in gestation” when the decedent died to inherit if they survive for 120 hours after birth. Posthumously conceived children do not fall within this exception, and no one disputes that M.J.M. and M.L.M. were not “in gestation” when Mr. Mattison died. Other courts that have interpreted similar state intestacy provisions agree that children conceived after a parent’s death may not inherit from that parent intestate.

Even if the Court determines that the state intestacy law is ambiguous, the intestacy law’s purpose of promoting an efficient system for liquidating a decedent’s estate is furthered by limiting heirs to those alive at a decedent’s death. Allowing posthumously conceived children to inherit intestate could keep a decedent’s estate open indefinitely. Furthermore, the legislature amended the intestacy law to allow children conceived using “assisted reproductive technologies” to inherit intestate under certain conditions not met by posthumously conceived children. This indicates the Legislature’s intent to require that heirs be alive at the time of the decedent’s death in order to inherit intestate. Plaintiff’s arguments have no support in the text or purpose of the intestacy laws. This Court should hold that children conceived

after the death of their biological father using his sperm cannot inherit from him as his children under Michigan intestacy law.

STANDARD OF REVIEW

The Court reviews “[m]atters of statutory interpretation” de novo. *Duffy v Michigan Dep’t of Natural Resources*, 490 Mich 198, 204; 805 NW2d 399 (2011). The Court’s “primary goal is to discern the intent of the Legislature by first examining the plain language of the statute. Statutory provisions must be read in the context of the entire act, giving every word its plain and ordinary meaning. When the language is clear and unambiguous, [the Court] will apply the statute as written and judicial construction is not permitted.” *Driver v Naini*, 490 Mich 239, 246-47; 802 NW2d 311 (2011) (internal citations and footnotes omitted). “When a statute is ambiguous, judicial construction is appropriate to determine the statute’s meaning. When determining the Legislature’s intent, the statutory language is given the reasonable construction that best accomplishes the purpose of the statute.” *People v Feezel*, 486 Mich 184, 205; 783 NW2d 67 (2010) (internal quotations and citations omitted).

ARGUMENT

MICHIGAN LAW EXCLUDES CHILDREN CONCEIVED POSTHUMOUSLY FROM INTESTATE SUCCESSION

I. Posthumously Conceived Children Do Not Meet The Michigan Intestacy Law Requirement That Heirs Be Alive And Survive The Decedent.

A. Michigan intestacy law describes which individuals may inherit a decedent's estate, in the absence of a will, and excludes all others. MCL 700.2101(1) provides that "[a]ny part of a decedent's estate not effectively disposed of by will passes by intestate succession to the decedent's heirs as prescribed in this act." Intestacy law excludes from inheritance any person not specifically listed in the statute. See *Crystal v Hubbard*, 414 Mich 297, 313 n7; 324 NW2d 869 (1982) ("Under our intestacy laws, not *all* relatives are potential intestate heirs."); see also *In re Estate of Raymond*, 483 Mich 48, 71; 764 NW2d 1 (2009) (Markman, J., dissenting) ("[T]he state's intestacy statutes . . . only distribute a testator's estate to the testator's heirs at law.").

In order for an individual to inherit as a child of the decedent, the individual must "survive the decedent." MCL 700.2103. Thus, the individual is required to be alive at the time of the decedent's death. Posthumously conceived children do not meet this requirement, and thus cannot inherit intestate. Under Michigan law, intestate inheritance rights vest at the time of the decedent's death. See *In re Dempster's Estate*, 247 Mich 459, 462; 226 NW 243 (1929) (quoting *In re Pivonka's*

Estate, 202 Iowa 855; 211 NW 246 (1926), “with approval” for the proposition that the “heirs of a decedent are, under the laws of this state, to be determined by ascertaining upon whom the law casts the estate immediately upon the death of the ancestor”); see also *In re Finlay Estate*, 430 Mich 590, 601 & n12; 424 NW2d 272 (1988) (“[P]otential heirs and legatees do not have a right in an estate until the testator dies.”); *In re Adolphson Estate*, 403 Mich 590, 593; 271 NW2d 511 (1978) (“Determinations of heirs are to be governed by statutes in effect at the time of death.”); *In re Jamieson Estate*, 374 Mich. 231, 251; 132 NW2d 1 (1965) (“[O]nly those entitled to inherit at the death of another can be called his heirs.”) (quoting *New England Trust Co v Watson*, 330 Mass 265, 267; 112 NE2d 799 (1952)). Children who were conceived after the estate holder’s death, like M.J.M. or M.L.M., were not alive at the time inheritance rights vested and thus cannot inherit intestate under Michigan law.

Posthumously conceived children also fail to satisfy the requirement that heirs survive the decedent. MCL 700.2103 provides that a decedent’s estate passes only to “individuals who survive the decedent.” The statute states that “[s]urvive” means that an individual neither predeceases an event, including the death of another individual, nor is considered to predecease an event under section 2104 or 2702.” MCL 700.1107(j); see also MCL 700.2106(3)(b) (“‘Surviving descendant’ means a descendant who neither predeceased the decedent nor is considered to have

predeceased the decedent under section 2104.”). Section 700.2104 provides that “[a]n individual who fails to survive the decedent by 120 hours is considered to have predeceased the decedent for purposes of . . . intestate succession, and the decedent’s heirs are determined accordingly.”³

These provisions establish that an individual must both be alive at the time of the decedent’s death and survive the decedent in order to inherit intestate. To “survive” means to “to remain or in existence (as after another’s death)] . . . to live beyond the life or existence of.” *Webster’s Third New International Dictionary, Unabridged Edition* 2203 (1993). “Survivor” is defined as “one that survives” or “one that outlives another.” *Id.* at 2203; see also *Black’s Law Dictionary* (9th ed. 2009) (defining “survivor” as “[o]ne who outlives another”).

The statute confirms the requirement that an individual must be alive at the time of a decedent’s death in order to inherit intestate by recognizing a narrow exception to this rule for “[a]n individual in gestation.” MCL 700.2108 provides that “[a]n individual in gestation at a particular time *is treated as living* at that time if the individual lives 120 hours or more after birth.” (emphasis added). This exception, however, has no application to children who, like M.J.M. and M.L.M., were conceived

³ Section 700.2702 applies to donative dispositions in wills and other governing instruments, and is inapplicable here. The provision, however, similarly imposes a 120-hour survival requirement.

after the decedent's death. "[G]estation" is defined as "the carrying of young usu[ally] in the uterus from conception to delivery." *Webster's Third New International Dictionary, Unabridged Edition* at 952. No one disputes that M.J.M. and M.L.M. were not in gestation until after Mr. Mattison died. See Pl Br 7-8, 11.

B. Plaintiff's attempts to read state intestacy law broadly to allow M.J.M. and M.L.M. to inherit intestate are unavailing. Plaintiff concedes that M.J.M. and M.L.M. were not conceived until after Mr. Mattison's death, as "the actual meeting of sperm and egg did not take place during the marriage." Pl Br 11. Yet plaintiff argues for a broader understanding of conception as a "process of conception" that began while Mr. Mattison was living. See Pl Br 11. There is no basis for this interpretation of "conception" in the state intestacy statutes. Nor is there a basis under these statutes for allowing posthumously conceived children to inherit intestate from their biological fathers even if, as plaintiff asserts, the decedent "acknowledged the possibility of later conceived children." See Pl Br 10. The only statutory provision that allows children born after the death of a parent to inherit intestate requires that the children be "in gestation" at the time of the parent's death. See MCL 700.2108. Plaintiff concedes that M.J.M. and M.L.M. were not "in gestation" until after Mr. Mattison's death. See Pl Br 7-8.

Plaintiff confuses the requirements that an heir must be alive at the death of the decedent and survive the decedent with a separate condition required to inherit as

a child: the establishment of a parent-child relationship. State law provides that, “[i]f a child is born or conceived during a marriage, both spouses are presumed to be the natural parents of the child for purposes of intestate succession.” MCL 700.2114(1)(a). This includes “[a] child conceived by a married woman with the consent of her husband following utilization of assisted reproduction technology.” MCL 700.2114(1)(a). Marriage, however, terminates upon the death of a spouse. See *Tiedman v Tiedman*, 400 Mich 571, 576-77, 255 NW2d 632 (1977). As plaintiff acknowledges, M.J.M. and M.L.M. were both conceived and born after the death of Mr. Mattison, and therefore were not “born or conceived during a marriage.” See Pl Br 7-8.

State law provides that a parent and child relationship can be established “[r]egardless of the child’s age or whether or not the alleged father has died,” where “the court with jurisdiction over probate proceedings relating to the decedent’s estate determines that the man is the child’s father, using the standards and procedures established under the paternity act, 1956 PA 205, MCL 722.711 to 722.730.” MCL 700.2114(1)(b)(v). Plaintiff states that “[a] paternity action could be filed on behalf of” M.J.M. and M.L.M., Pl Br 14, and therefore, argues that M.J.M. and M.L.M. should be deemed able to inherit intestate as Mr. Mattison’s children. Regardless of whether plaintiff could establish the parent-child relationship required under state intestacy law, plaintiff cannot meet the separate requirements that M.J.M. and M.L.M.

were alive when Mr. Mattison died and that they “survived” Mr. Mattison, as that term is used in the intestacy statutes.

Plaintiff’s reliance on the Ninth Circuit’s decision in *Gillett-Netting v Barnhart*, 371 F3d 593 (CA9, 2004), is similarly misplaced. The Ninth Circuit interpreted the Social Security Act—not the ability of children to inherit under state intestacy law—and held that any undisputed biological child of a deceased wage earner has a child-parent relationship with the wage earner for the purpose of obtaining social security child survivors benefits. See *id.* at 596-97. *Gillett-Netting* is unrelated to the requirements of Michigan intestacy law. And the Ninth Circuit recently affirmed an SSA determination denying child’s benefits to a posthumously conceived child on the basis of California intestacy law. See *Vernoff v Astrue*, 568 F3d 1102, 1106-12 (CA9, 2009). Even assuming arguendo that plaintiff can establish a parent-child relationship between Mr. Mattison and M.J.M. and M.L.M., plaintiff fails to meet the state intestacy law requirement that M.J.M. and M.L.M. were alive and survived Mr. Mattison.

II. Other Courts Reviewing Similar Statutory Provisions Have Held That Posthumously Conceived Children Cannot Inherit Intestate.

Numerous courts that have reviewed the same or similar intestacy provisions have overwhelmingly determined that posthumously conceived children are not surviving heirs entitled to inherit intestate. The Michigan Estates and Protected

Individuals Code (“EPIC”) was enacted in 1998, see 1998 PA 386, and was intended to “make Michigan probate law more consistent with that of other states, which would provide attorneys and judges with a wider body of case law for consideration.” Senate Legislative Analysis, SB 209, February 26, 1997. The intestacy statutes at issue here are also based on the Uniform Probate Code. Compare MCL 700.2103, 700.2104, 700.2108 with Uniform Probate Code 2-103, 2-104. The intestacy laws of other states are likewise based on the Uniform Probate Code or contain provisions similar to those enacted in Michigan.

In *Khabbaz v Commissioner*, 155 NH 798, 930 A2d 1180 (2007), the Supreme Court of New Hampshire reviewed the New Hampshire intestacy statute requiring that heirs “survive” the decedent. The court stated that “the plain meaning of the word ‘surviving’ is ‘remaining alive or in existence.’ . . . In order to *remain* alive or in existence after her father passed away, [the posthumously conceived child] would necessarily have to have been ‘alive’ or ‘in existence’ at the time of his death.” *Id.* at 802 (internal citation omitted). As the child was conceived after her father’s death, the court held that the child did not “surviv[e]” her father, and could not inherit intestate. *Id.* at 802.⁴

⁴ The issue of whether posthumously conceived children can inherit intestate under Nebraska state law is currently pending in the Nebraska Supreme Court. See *Amen v Astrue*, No S-11-1094 (oral argument scheduled for October 2012).

Numerous courts have held that state intestacy provisions similar to MCL 700.2108—those that permit children born after the death of a parent to inherit intestate if they are were conceived or gestating before the parent’s death—do not permit posthumously conceived children to inherit intestate. *See Beeler v Astrue*, 651 F3d 954, 965 (CA 8, 2011), pet for cert filed on other grounds, 80 USLW 3360 (Nov 23, 2011) (No 11-667) (interpreting Iowa afterborn heir provision); *Vernoff*, 568 F3d at 1110 (“[California afterborn provision] does not extend intestacy rights to posthumously-conceived children.”); *Finley v Astrue*, 372 Ark 103, 110-11; 270 SW3d 849 (2008) (posthumously conceived children are not eligible heirs under the Arkansas afterborn heir provision); *Stephen v Comm’r of Social Security*, 386 F Supp 2d 1257, 1264 n8 (MD Fla, 2005) (holding that a posthumously conceived child is not an afterborn heir within the meaning of Florida intestacy law).

III. Even If The Statute Is Ambiguous, The Statute’s Purpose Is Furthered By Prohibiting Posthumously Conceived Children From Inheriting Intestate.

If the Court determines that the state intestacy statute is ambiguous, it must give the statutory language the “reasonable construction that best accomplishes the purpose of the statute.” *Feezel*, 486 Mich at 205 (internal quotations omitted). Requiring that heirs be alive at the time of the decedent’s death furthers the purpose of state intestacy law.

The “underlying purposes and policies” of EPIC are “[t]o simplify and clarify the law concerning the affairs of decedents, missing individuals, protected individuals, minors, and legally incapacitated individuals”; “[t]o discover and make effective a decedent’s intent in distribution of the decedent’s property”; “[t]o promote a speedy and efficient system for liquidating a decedent’s estate and making distribution to the decedent’s successors”; and “[t]o make the law uniform among the various jurisdictions, both within and outside of this state.” MCL 700.1201. Simplicity, efficient liquidation of estates, and uniformity are all furthered by requiring that intestate succession be determined upon the decedent’s death. See also *Reed v Campbell*, 476 US 852, 855; 106 S Ct 2234; 90 L Ed 2d 858 (1986) (recognizing that “interest in finality may provide an additional, valid justification for barring the belated assertion of claims” in estate distribution); *Lalli v Lalli*, 439 US 259, 270-71; 99 S Ct 518; 58 L Ed 2d 503 (1978) (stating that “[s]tate’s interests are substantial” in the “finality of decree in [an] estate.”). As the New Hampshire Supreme Court noted, “children may be conceived posthumously several years after an individual’s death, and waiting for the potential birth of a posthumously conceived child could tie up estate distributions indefinitely.” *Khabbaz*, 155 NH at 803.

Contrary to plaintiff’s assertion, see Pl Br 9, the Legislature did consider new reproductive technologies when it amended intestacy law in 1998. MCL 700.2114(1)(a) acknowledges that a child could be conceived “following utilization of

assisted reproductive technology” and permitted such a child to establish the parent-child relationship necessary to inherit intestate under certain conditions. That the Legislature permitted children conceived through reproductive technology during a marriage to inherit intestate further supports that the Legislature did not intend for posthumously conceived children to inherit intestate. The Legislature’s silence on the inheritance rights of posthumously conceived children stands in stark contrast to a number of states that have amended their laws to explicitly define the inheritance rights of posthumously conceived children. See, e.g., Cal Prob Code 249.5; Colo Rev Stat 19-4-106(8); Del Code Ann tit 13, 8-707; Fla Stat 742.17(4); Tex Fam Code Ann 160.707; Va Code Ann 20-158(B); Wash Rev Code 26.26.730; Wyo Stat Ann 14-2-907; see also *Woodward v Comm’r of Social Security*, 435 Mass. 536; 760 NE2d 257 (2002) (recognizing the right of posthumously conceived children to inherit intestate upon meeting certain conditions). These statutes generally require that the deceased parent consented in writing to being a parent after his death. See, e.g., Del Code Ann tit 13, 8-707.

RELIEF REQUESTED

For the foregoing reasons, the Court should hold that children conceived after the death of their biological father through artificial insemination using his sperm cannot inherit from him as his children under Michigan intestacy law.

Respectfully submitted,

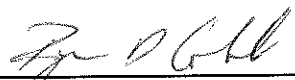
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APRIL 2012


PROOF OF SERVICE

I hereby certify that on this 12th day of April, 2012, I filed and served twenty-four copies of the Brief for Defendant and this Proof of Service upon the Court by Federal Express overnight delivery. On the same date, I also served the following counsel with two copies of the Brief for Defendant and this Proof of Service by Federal Express overnight delivery:

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I also hereby certify that on the same date, I served one copy of the Brief for Defendant and this Proof of Service by Federal Express overnight delivery on the Attorney General for the State of Michigan.

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